

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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HUNTINGTON NATIONAL BANK,

Plaintiff-Appellant,

v

DEBI ROBACH,

Defendant-Appellee,

and

RONALD ROBACH,

Defendant.

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UNPUBLISHED

August 29, 2006

No. 267758

Ionia Circuit Court

LC No. 04-023682-CK

Before: Davis, P.J. and Sawyer and Schuette, JJ.

PER CURIAM.

Plaintiff appeals by right from the trial court's order granting summary disposition to defendant on plaintiff's claim of fraud and unjust enrichment. We reverse and remand for further proceedings.

**I. FACTS**

A check for \$46,600 was erroneously deposited into the joint account of defendants Debi and Ronald Robach at plaintiff Huntington National Bank on April 3, 1998. Before the deposit, the Robach's account contained \$665.42. The Robach's bank statements indicate that the balance in the account did not decrease below \$46,600 until July 22, 1998, when Debi Robach wrote a check for \$15,000 to one of the Robach's businesses. After July 22, 1998, numerous withdrawals from the Robach's account continued until plaintiff learned of the erroneous deposit in late 1998. Plaintiff reversed the deposit on December 7, 1998, when the balance in defendants' account was only \$2,707.62, resulting in an overdraft of \$43,892.38. Plaintiff also froze funds totaling \$3,801 in two of the Robach's business accounts. Plaintiff was unable to collect \$40,091.38.

Plaintiff contacted defendant Debi Robach to obtain repayment of the erroneously deposited funds. Debi Robach maintained that she thought the money in the account was

\$20,000 in proceeds from a \$166,000 IRA that she and Ronald Robach, her then husband but now divorced, had cashed in and deposited in their account on April 24, 1998.

Plaintiff sued Debi Robach and Ronald Robach on September 30, 2004, alleging one count of fraud and one count of unjust enrichment. Plaintiff served defendants by alternate service. After Debi Robach and Ronald Robach did not timely answer the complaint, plaintiff obtained default judgments against them on April 19, 2005. On June 20, 2005, Debi Robach, who had been staying in Arizona, moved to set aside the default judgment, stating that the “alleged claim of Huntington occurred in April 1998, well over six years prior to attempted service of process on Defendant Debi Robach, or for that matter, the named Co-Defendant Ronald Robach.” The circuit court granted Debi Robach’s motion and set aside the default judgment on August 9, 2005. Ronald Robach has not moved to set aside the default judgment entered against him.

On November 10, 2005, plaintiff moved for summary disposition. On December 2, 2005, defendant simultaneously filed an answer to the complaint, affirmative defenses, and a response to defendant’s motion for summary disposition. All three documents are simply dated December 2, 2005, without a further hour and minute entry. The answer and affirmative defenses did not include a statute of limitations defense. However, defendant’s answer to plaintiff’s motion raised a statute of limitations defense, stating:

Defendant now answers this Motion under the Rule, cited by Plaintiff [MCR] 2.116(C)(7) stating that the alleged claim of Plaintiff is barred by the Statute of Limitations. Defendant cites MCLA 440.4111 [that] reference[s] bank deposits and collections, which states “An action to enforce, an obligation, duty or right arising under this article, must be commenced within three years after the cause of action accrues.” According to Plaintiff’s pleadings, action accrued on April 4, 1998. Over six (6) years passed before the filing of Plaintiff’s complaint Defendant, to wit September 2004.

Plaintiff argued that defendant did not first raise the statute of limitations defense in her answer or in a dispositive motion before she filed her answer. However, the circuit court treated defendant’s answer to plaintiff’s motion as a counter-motion for summary disposition. The circuit court reasoned as follows:

As to the Defendant’s motion for dismissal because of the Statute of [Limitations], it is the Court’s decision, based on MCR 2.116(I)(2) that if there was a fraud committed and the money was deposited in April of 1998, the Statute of Limitations, I think would have run in April of 2004, based on that. Apparently the bank had the ability to put a freeze on it. If they thought the deposit was inappropriate they could have done the same thing during that six year period before the suit was started.

So I’ll grant the defendant’s motion based on the Statute of [Limitations], as to Debi Robach only.”

On December 20, 2005, the circuit court entered an order denying plaintiff’s motion for summary disposition and dismissing the complaint. Plaintiff appeals by right.

## II. ANALYSIS

Plaintiff argues that the trial court erred in granting summary disposition to defendant because defendant waived her statute of limitations defense when she failed to comply with MCR 2.111(F)(2)(a) and 2.116(D)(2). We agree.

A party must raise a statute of limitations defense in a responsive pleading or in a motion under MCR 2.116(C) before a party files an initial responsive pleading, or the defense is waived. MCR 2.111(F)(2)(a); MCR 2.116(D)(2). As recounted above, defendant did not raise a statute of limitations defense in her initial pleading or in a motion under MCR 2.116 before she filed her answer. Defendant initially raised a statute of limitations defense in her motion to set aside the default judgment and in her response to plaintiff's motion for summary disposition. However, neither a motion to set aside a default judgment nor a response to a motion for summary disposition is a responsive pleading. MCR 2.110(B). Therefore, defendant failed to comply with MCR 2.111(F)(2) and MCR 2.116(D)(2) and waived her statute of limitations defense.

Accordingly, we reverse the order of the trial court and remand for further proceedings. We take no position on the ability of defendant to amend her answer under MCR 2.118(D) to raise a statute of limitations defense.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Bill Schuette